Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS 08(F)–266 OF 2009, 08(F)–267 OF 2009(W), 08(I)–316 OF 2009(W), 08(F)–326 OF 2009(W) AND 08(F)–333 OF 2009(W)

ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND ZULKEFLI FCJ

12 NOVEMBER 2010

Civil Procedure — Appeal — Appeal to Federal Court — Whether Federal Court may hear leave application without benefit of written judgment of Court of Appeal

Civil Procedure — Appeal — Appeal to Federal Court — Whether judges sitting on leave panel may sit on appellate panel of same appeal

Civil Procedure — Appeal — Leave to appeal — Leave to appeal to Federal Court — Principles to be considered in granting leave — Resolving inconsistencies in judgments of Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257 ('Syed Kechik') and Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621 ('Joceline Tan') — Principles in Syed Kechik accepted and additional conditions set by Joceline Tan rejected

Civil Procedure — Appeal — Leave to appeal — Leave to appeal to Federal Court — Whether appellate panel may reconsider leave to appeal granted by leave panel

A special panel of five judges was set up to resolve inconsistencies in the judgments of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 ('*Syed Kechik*') and *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 ('*Joceline Tan*'). These cases interpreted the provisions of s 96 of the Courts of Judicature Act 1964 ('s 96') relating to application for leave to appeal to the Federal Court from the decisions of the Court of Appeal. In both *Syed Kechik* and *Joceline Tan*, it was held that the questions to be referred to the Federal Court must be a question of general principle decided for the first time. *Syed Kechik* held that leave may be granted where '... a particular fact situation may be most unlikely to recur in the same form but yet may exemplify a type of situation in which authoritative guidance of the Federal Court would be of

great utility'. On the other hand *Joceline Tan* disagreed with the statements made by the Federal Court in *Syed Kechik* in so far as the first limb of s 96 is concerned. *Joceline Tan* held that the question of general principle decided for the first time must necessarily be that of the Court of Appeal's since the word 'decided' (in the past tense) is used and that, therefore, the word cannot refer to a future decision from the Federal Court. *Joceline Tan* imposed further conditions to those given in *Syed Kechik*.

Held, following the principles in *Datuk Syed Kechik*'s case:

(1) It is clear from the wording of s 96(a) that leave to appeal must be against the decision of the Court of Appeal. Once an issue has been decided by the trial judge, and the appeal decided by a panel of three at the Court of Appeal that is final unless it can be shown that the case falls within the scope of s 96(a) (see paras 21–22).

(2) It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction. The legal issue posed to the Federal Court may have arisen from the decision of the High Court in the exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. Under the first limb, that decision by the Court of Appeal must have raised a question of law which is of general principle not previously decided by the Federal Court. Alternatively the applicant must show that the decision would be to public advantage (see paras 14(a) & 23).

(3) The guidelines set by *Joceline Tan* are rather too strict which may defeat the objective of s 96(a). The Federal Court does not agree with the interpretation given in that case that there must have been two inconsistent judgments of the Court of Appeal before leave could be given. There need not had been two or more previous decisions of the Court of Appeal on the same issue. Section 96(a) does not impose such a restriction and it is not for the court to do so. The Federal Court accepted the principles in *Syed Kechik* and rejected the additional conditions set by *Joceline Tan* (see paras 26 & 33).

(4) An intended applicant for leave to appeal to the Federal Court should consider the following points before filing his application, namely: (1) basic prerequisites: (i) leave to appeal must be against the decision of the Court of Appeal (ii) the cause or matter must have been decided by the High Court exercising its original jurisdiction (iii) the question must involve a question of law which is of general principle not previously decided by the Federal Court and (iv) the issue to be appealed against has been decided by the Court of Appeal; (2) leave will normally not be granted in interlocutory appeals; (3) whether there has been a consistent judicial opinion which may be uniformly wrong; (4) whether there is a

dissenting judgment in the Court of Appeal; (5) leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance; (6) leave will not normally be given: (i) where it merely involves interpretation of an agreement unless the Federal Court is satisfied that it is for the benefit of the trade or industry concerned (ii) the answer to the question is not abstract, academic or hypothetical and (iii) either or both parties are not interested in the result of the appeal; (7) that on first impression the appeal may or may not be successful; if it will inevitably fail leave will not be granted (see para 34 & 34(a)–(g)).

(5) Once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel (see para 41).

(6) It does not make any difference who sits at the leave panel and who sits to decide the appeal. The issues, considerations and arguments that are before the leave panel would definitely be different from that that would be put to the appellate panel (see para 43).

(7) Grounds of judgment of the Court of Appeal are not in every case necessary to an application for leave. This is especially so when the judgment or order of the High Court has been upheld unanimously by the Court of Appeal. In such cases more often than not the Federal Court can decide on the issues of leave without having to read the grounds. However, if the decision of the High Court has been reversed, grounds would then be beneficial. Where question of facts and law are obvious particularly so in interlocutory matters, no grounds again are necessary (see para 44).

[Bahasa Malaysia summary

Suatu panel khas dengan lima orang hakim telah dilantik untuk menyelesaikan ketidak konsistenan di dalam penghakiman-penghakiman *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 ('*Syed Kechik*') dan *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 ('*Joceline Tan*'). Kes-kes ini menafsirkan peruntukan s 96 Akta Mahkamah Kehakiman 1964 ('s 96') berkaitan dengan permohonan untuk kebenaran ke Mahkamah Persekutuan daripada keputusan Mahkamah Rayuan. Di dalam kes *Syed Kechik* dan *Joceline Tan*, diputuskan bahawa persoalan yang akan dirujuk ke Mahkamah Persekutuan mestilah persoalan prinsip umum yang diputuskan untuk pertama kalinya. Kes *Syed Kechik* memutuskan bahawa kebenaran boleh diberikan di mana '… a particular fact situation may be most unlikely to recur

in the same form but yet may exemplify a type of situation in which authoritative guidance of the Federal Court would be of great utility'. Sebaliknya, kes *Joceline Tan* tidak bersetuju dengan kenyataan-kenyataan yang dibuat oleh Mahkamah Persekutuan di dalam kes *Syed Kechik* setakat yang melibatkan bahagian pertama s 96 . Kes *Joceline Tan* memutuskan bahawa persoalan prinsip umum yang diputuskan pada pertama kali perlulah dari Mahkamah Rayuan oleh kerana perkataan 'decided' (telah berlalu) digunakan dan dengan itu, perkataan tersebut tidak boleh merujuk kepada keputusan yang akan datang dari Mahkamah Persekutuan. Kes *Joceline Tan* meletakkan syarat-syarat selanjutnya ke atas syarat-syarat yang diberikan di dalam kes *Syed Kechik*.

Diputuskan, mengikut prinsip-prinsip di dalam kes *Datuk Syed Kechik*:

(1) Jelas daripada bahasa s 96(a) bahawa kebenaran untuk merayu mestilah terhadap keputusan Mahkamah Rayuan. Sebaik sahaja sesuatu isu diputuskan oleh hakim bicara, dan rayuan diputuskan oleh panel tiga orang hakim di Mahkamah Rayuan ia adalah muktamad kecuali boleh ditunjukkan bahawa kes tersebut terangkum di dalam skop s 96(a) (lihat perenggan 21–22).

(2) Juga jelas daripada seksyen tersebut bahawa kausa atau perkara mestilah telah diputuskan oleh Mahkamah Tinggi dalam bidang kuasa asalnya. Isu perundangan yang dikemukakan ke Mahkamah Persekutuan mungkin berbangkit daripada keputusan Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya atau di Mahkamah Rayuan semasa memberikan penghakiman atau membuat perintah di bawah bahagian pertama dan mestilah persoalan tentang prinsip umum. Di bawah bahagian pertama, keputusan oleh Mahkamah Rayuan mestilah telah membangkitkan persoalan undang-undang yang berkaitan prinsip umum yang tidak diputuskan oleh Mahkamah Persekutuan sebelum ini. Secara alternatif, pemohon mesti menunjukkan bahawa keputusan tersebut mempunyai kepentingan kepada masyarakat awam (lihat perenggan 14(a) & 23).

(3) Garis panduan yang dibuat oleh kes *Joceline Tan* adalah amat ketat yang mungkin mematahkan objektif s 96(a). Mahkamah Persekutuan tidak bersetuju dengan tafsiran yang diberikan di dalam kes itu bahawa mungkin terdapat dua penghakiman Mahkamah Rayuan yang tidak konsisten sebelum kebenaran diberikan. Tidak perlu wujud dua atau lebih keputusan Mahkamah Rayuan yang terdahulu atas isu yang sama. Seksyen 96(a) tidak meletakkan pengehadan sedemikian dan bukan tugas mahkamah untuk berbuat demikian. Mahkamah Persekutuan menerima prinsip-prinsip di dalam kes *Syed Kechik* dan menolak syarat-syarat tambahan yang diberikan oleh kes *Joceline Tan* (lihat perenggan 26 & 33).

(4) Seseorang pemohon yang berniat untuk memohon kebenaran ke Mahkamah Persekutuan sewajarnya mempertimbangkan perkara-perkata berikut sebelum memfailkan permohonannya, iaitu: (1) keperluan asas: (i) kebenaran untuk merayu mestilah terhadap keputusan Mahkamah Rayuan, (ii) kausa atau perkara mestilah telah diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya, (iii) persoalan tersebut mestilah melibatkan persoalan undang-undang yang adalah berkaitan prinsip umum yang tidak diputuskan oleh Mahkamah Persekutuan sebelum ini dan (iv) isu yang dirayu telah diputuskan oleh Mahkamah Rayuan; (2) Kebenaran selalunya tidak diberikan di dalam rayuan interlokutori; (3) Sama ada terdapat pendapat perundangan yang tidak konsisten yang mungkin adalah salah secara bersama; (4) Sama ada terdapat penghakiman menentang di Mahkamah Rayuan; (5) Kebenaran untuk merayu terhadap pentafsiran statut tidak akan diberikan kecuali ditunjukkan bahawa pentafsiran tersebut penting untuk awam; (6) Kebenaran biasanya tidak diberikan: (i) di mana ia semata-mata melibatkan pentafsiran suatu perjanjian kecuali Mahkamah Persekutuan berpuas hati bahawa ia adalah untuk faedah perniagaan atau industri yang berkaitan, (ii) Jawapan kepada persoalan adalah tidak abstrak, akademik atau hipotetikal dan (iii) sama ada satu atau kedua-dua pihak tidak berminat dengan keputusan rayuan; (7) Bahawa atas pandangan pertama rayuan tersebut mungkin atau mungkin tidak berjaya; jika ia akan gagal kebenaran tidak akan diberikan (lihat perenggan 34 & 34(a)–(g)).

(5) Selepas kebenaran diberikan, panel rayuan tidak sewajarnya mempertimbangkan lagi sama ada kebenaran perlu atau tidak perlu diberikan kecuali bahawa kebenaran tersebut diberikan secara salah disebabkan undang-undang atau statut tertentu, yang menyebabkan mahkamah yang mendengar rayuan menolak rayuan in limine, tidak didedahkan atau tidak disedari oleh panel yang memutuskan permohonan kebenaran (lihat perenggan 41).

(6) Ia tidak membawa apa-apa perbezaan siapa yang menjadi panel atau siapa yang memutuskan rayuan. Isu-isu, pertimbangan dan hujahan-hujahan yang dikemukakan kepada panel yang memutuskan permohonan kebenaran sememangnya berbeza daripada yang dikemukakan kepada panel rayuan (lihat perenggan 43).

(7) Alasan-alasan rayuan Mahkamah Rayuan tidak dalam semua kes perlu untuk permohonan kebenaran. Ini adalah khususnya benar apabila penghakiman atau perintah Mahkamah Tinggi telah disahkan secara sebulat suara oleh Mahkamah Rayuan. Dalam kes sebegitu selalunya Mahkamah Persekutuan boleh memutuskan isu-isu untuk kebenaran tanpa perlu membaca alasan-alasan. Walau bagaimanapun, jika keputusan Mahkamah Tinggi telah diakas, alasan-alasan akan menjadi

penting. Di mana persoalan-persoalan fakta dan undang-undang adalah jelas, khususnya di dalam perkara-perkara interlokutori, alasan-alasan sekali lagi tidak diperlukan (lihat perenggan 44).]

Notes

For cases on appeal to Federal Court, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 833–845.

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1225–1287.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Armstrong Ex parte Gilchrist, in re (1886) 17 QBD 521, CA (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, SC (refd)

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)

Baldota Brothers v Libra Mining Works AIR 1961 SCC 100 (refd)

Beverley Rawleigh v Derek Maxwell Tait [2009] NZSC 11, SC (refd)

Buckle v Holmes [1926] 2 KB 125, CA (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (folld)

Hancock Family Memorial Foundation Ltd and another v Porteous and another (2000) 201 CLR 347, HC (refd)

Iran Nabuvat, The [1990] 3 All ER 9, CA (distd)

Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai AIR 2004 SC 1815 (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (not folld)

Mathai @ Joby v George & Anor (unreported, 19 March 2010), SC (refd)

Meidi-Ya Co Ltd, Japan & Anor v Meidi (M) Sdn Bhd [2009] 2 MLJ 14, FC (refd)

Minister for Human Resources, The v Thong Chin Yoong and another appeal [2001] 4 MLJ 225, FC (refd)

Mukhlal Singh & Anor v Kishuni Singh & Ors AIR 1931 Vol 18 PC 22(1) (refd)

Mussoorie Bank, Limited, The v Albert Charles Raynor (1882) 7 App Cas 321, PC (refd)

R v Secretary of State for Trade and Industry, ex p Eastaway [2000] 1 WLR 2222, HL (refd)

Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513, FC (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257, FC (distd)

TFAC Limited and Ors v Susan Elizabeth David and Anor [2009] NZSC 51, SC (refd)

Toronto Railway Company v Corporation of the City of Toronto [1920] AC 426, PC (refd)
Zweni v Minister of Law & Order 1993 (1) SA 523 (A) (refd)

Legislation referred to

Administration of Justice Act 1960 [UK] s 1, 1(2)
Appellate Jurisdiction Act 1876 [UK] s 4
Courts of Judicature Act 1964 s 96, 96(a)
Criminal Procedure Code s 374
Federal Constitution art 128
Indian Constitution [IND] art 136
Legal Profession Act 1976 s 19
Rules of the Federal Court 1995 rr 47, 47(4), 108, 108(1)(c), 137
Rules of the High Court 1980 O 14, O 18 r 19
Rules of the Supreme Court of the United States [US] r 10
Statute 28 USC 1251 [US]
Supreme Court Act 59 of 1959 [SA]
Supreme Court Act 2003 No 53 [NZ] s 13
US Constitution [US] art III, s 2, cl 2

M Nagarajah (R Tharmy and Tanya Lopez with him) (Shook Lin & Bok) for the applicant in Civil Application Nos 08(f)–266 of 2009 and 08(f)–267 of 2009(W).
Cecil Abraham (Rishwant Singh, Jeremy Joseph, Ravin Woodhull, Mohan Das (Zaid & Co) with him) (Joseph & Partners) for the respondents in Civil Application Nos 08(f)–266 of 2009 and 08(f)–267 of 2009(W).
Darryl SC Goon (Choon Hon Leng with him) (Raja, Darryl & Loh) for the applicant in Civil Application No 08(i)–316 of 2009(W).
Rodney Gomez (Alexius Lee with him) (Shearn Delamore & Co) for the respondents in Civil Application No 08(i)–316 of 2009(W).
Cyrus Das (Alex De Silva and S Shamalah with him) (Bodipalar Ponnudurai De Silva) for the applicant in Civil Application No 08(f)–326 of 2009(W).
Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the respondents in Civil Application No 08(f)–326 of 2009(W).
N Chandran (Koh Yew Chong with him) (Maxwell, Kenion, Cowdy & Jones) for the applicant in Civil Application No 08(f)–333 of 2009(W).
Porres Royan (T Sundhar and Low Weng Tchung with him) for the respondents in Civil Application No 08(f)–333 of 2009(W).

Zaki Azmi Chief Justice:

INTRODUCTION

[1] This special panel of five judges was set up at the request of some senior members of the Bar to resolve inconsistencies in the judgments of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah*

Foundation & Ors and another application [1999] 1 MLJ 257 ('*Syed Kechik*') and *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 ('*Joceline Tan*'). These cases interpreted the provisions of s 96 of the Courts of Judicature Act 1964 ('s 96') relating to application for leave to appeal to the Federal Court from the decisions of the Court of Appeal.

[2] Several senior members of the Bar listed in this judgment were invited to address the panel on the issues. It was agreed that this case be the test case. While counsel representing the parties in this leave to appeal submitted on behalf of their clients, other counsel were invited to address the court as amicus curiae. Once this issue is decided upon, they will then revert to argue on the substantial merit of their respective application. Therefore at this stage the facts of the respective applications are not relevant.

BACKGROUND

[3] Section 96(a) reads:

> Section 96 Conditions of Appeal
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving question of general principle decided for the first time or a question of importance upon which further argument and decision of the Federal Court would be to public advantage.

HISTORY OF S 96 OF THE CJA

[4] In order to understand s 96 , perhaps it would be useful to trace the history of the Federal Court and its jurisdiction to what it is today. I shall be relying in substance on the written submission of Dato' Cecil Abraham (now Tan Sri), counsel for the applicant.

[5] Since Merdeka day, 31 August 1957, the final appeal of superior courts was technically to the Yang di-Pertuan Agong who would then seek the advice of the judicial committee of the Privy Council. These appeals in civil matters to the Privy Council were abolished on 1 January 1985 (appeals to Privy Council on constitutional matters were abolished in 1978 and on criminal matters in 1978). Thereafter the apex court was the Federal Court which heard appeals direct from the High Courts. The effect was therefore that there was only a

single tier of appeal instead of two tiers to the Privy Council in civil matters. At the same time the Federal Court was renamed the Supreme Court.

[6] In response to calls for the creation of an intermediate appellate court, the Federal Constitution and Courts of Judicature Act 1964 were amended to create the Court of Appeal. An appeal from the High Court goes to the Court of Appeal and then to the Supreme Court, renamed again as the Federal Court being the apex and final appellate court.

[7] The Court of Appeal was established by the amendment of the Federal Constitution and the Courts of Judicature Act in 1994. After 1995 there was another amendment to the Courts of Judicature Act in 1998 which remains in force until today. This provision is now the s 96 of the Courts of Judicature Act 1964 which is the subject matter of this judgment.

[8] The explanatory statement to the Courts of Judicature (Amendment) Bill 1998 introducing the amendment as well as the speech of the Minister moving the Bill, was supposed to reflect the intention of Parliament in making this amendment. As such I reproduce them below. The Minister in his speech said:

> 6 Clause 8 seeks to amend section 96 of Act 91
>
> Appeals from the High Court in the exercise of its original jurisdiction to the Court of Appeal are automatic. However, appeals to the Federal Court from the Court of Appeal may only be made with the leave of the Federal Court. Since 1886, the principles applied by the English Courts in granting leave have been those principles which the proposed amendments seek to incorporate in section 96. These are sound principles which have been followed by Malaysian Courts. Putting these principles in the statute will eliminate lengthy arguments and hasten the disposal of applications for leave to appeal.

[9] The relevant part of the explanatory statement to the Bill reads:

> Section 96 is amended to include the principle of public importance in deciding whether leave to appeal to the Federal Court should be given. This principle is applied in the courts of Britain and it has managed to limit submissions in such applications for leave and expedite such applications.

[10] It is therefore obvious that the intention of Parliament was to adopt the same principles applicable in the grant of leave to appeal before the House of Lords (since October 2009 known as the Supreme Court). But was this so? It was argued that English precedents on leave to appeal should therefore become very relevant. But then, our s 96(a) is specifically worded while that of the English provision, as will be seen later in this judgment, is very generally

worded. As also will be seen later in this judgment the intention of following English principles could not be achieved.

[11] Let us briefly examine the principles laid out by *Syed Kechik* and *Joceline Tan*. Both these cases held that the questions to be referred to the Federal Court must be a question of general principle decided for the first time. *Syed Kechik* held that leave may be granted where '... a particular fact situation may be most unlikely to recur in the same form but yet may exemplify a type of situation in which authoritative guidance of the Federal Court would be of great utility'.

[12] On the other hand *Joceline Tan* disagreed with the statements made by this court in *Syed Kechik* in so far as the first limb of s 96 is concerned. *Joceline Tan* held that the question of general principle decided for the first time must necessarily be that of the Court of Appeal's since the word 'decided' (in the past tense) is used and that, therefore, the word cannot refer to a future decision from the Federal Court.

DATUK SYED KECHIK

[13] Now to more details. As far as I can perceive, *Syed Kechik* set out the following principles:

(a) The Federal Court is an apex court and 'it performs the vital function of supervising the process of judicial law making'.

(b) The judgment of the Court of Appeal must have 'raised a question of general importance not previously decided by the Federal Court or such decision requires further argument and decision of the Federal Court is to public advantage although the two conditions are not exclusive' (*Ex parte Gilchrist, in re Armstrong* (1886) 17 QBD 521, dicta of Lord Esher MR).

(c) The appellant also needs to show that he has a good prospect of success should leave be given. But this does not mean that the intending appellant must show a reasonable likelihood of success but merely to create a first impression view that the appeal might succeed. The court must form a provisional view of its likely success. The decision that is expected to be arrived at by the Federal Court on the question of law will either clarify and develop a general principle of law which will provide the solutions to many individual problems or even if it is not the answer to any specific question, such question will recur in the nature of legal practice.

(d) If the Federal Court is to develop the law which is one of its primary functions, leave should not be too restrictedly given. However the discretion whether to grant leave or not must be carefully exercised so as not to defeat the object of requiring leave. In exercising discretion to

grant leave, such discretion should be judiciously exercised so that it does not open floodgates hence resulting the grant of leave as a matter of right. It is difficult to lay down specific rules as to how this discretion is to be exercised. The principal consideration whether to grant leave in any particular case revolves around not only the facts of each case but more so the law applicable.

(e) The fact that the judgment of the Court of Appeal has raised a point of general principle is not sufficient for leave to be given if that principle is expected to apply to only 'a particular fact situation'. In other words if the decision is based on the finding of facts then leave should not be considered unless that set of facts would have an impact on the public at large.

(f) Where the decision of the Court of Appeal or the Federal Court raises a point of law of great general importance based on a legal principle which has been uniformly wrong then leave should be granted.

(g) Leave ought not to be given if it only involves a question of interpretation of a contract unless the impugned term of that contract is frequently used in trade or industry.

(h) Leave will not be given on an abstract, academic or hypothetical question of law. Particularly when it will not affect the result of the appeal one way or another or neither of the parties is interested in the result of the appeal.

(i) Public importance or public advantage on the question being decided is a major consideration.

(j) Even if there was no real doubt about the law but because the question was one of general importance upon which further argument should be heard and such decision would be of public advantage (*Buckle v Holmes* [1926] 2 KB 125), that should be considered. So is the situation where any point of law should be restated.

(k) A dissenting judgment in the Court of Appeal on that particular point of law in issue is a consideration as well.

JOCELINE TAN

[14] Now *Joceline Tan* imposes further conditions to those given in *Syed Kechik* apart from disagreeing with the interpretation of the first limb of s 96(a). According to that case, s 96(a) is to be read in the following manner:

(a) The appeal would be from any judgment or order of the Court of Appeal and it must have originated in the High Court in the exercise of its original jurisdiction.

(b) That impugned judgment or order must involve a question of general principle (as opposed to a specific question of law) and decided for the first time. The second limb refers to a question of importance upon which further argument and the decision of the Federal Court would be to public advantage. The court held that the word 'decided' used in the clause 'a question of general principle decided for the first time' must be the decision of the Court of Appeal.

(c) Limb A and B of s 96(a) are to be read mutually exclusive.

(d) There has to be two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court which is vague or wrong.

[15] Before giving my views on the interpretation of s 96(a), permit me to briefly consider the laws of England, New Zealand, South Africa, India and United States of America on the grant of leave to appeal to their respective apex courts.

[16] While it is sensibly arguable that there are provisions to appeal because a decision sometime needs to be reviewed and corrected (I do not mean review in the sense of r 137 of the Rules of the Federal Court 1995) by more experienced and wider body of judges, it has been said that to carry out this too far would reflect on the competency of the judges of the lower courts. There must be some finality in their decisions and these decisions are to be interfered only in instances where the trial courts have gone obviously wrong. On matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction is also often not interfered with by the appellate courts. An appellate court would normally not want to substitute its own subjective assessment of these matters to findings and conclusions arrived at by courts from where the decisions are appealed from. The other reason, of course, is that the appellate court is going to be flooded by appeals if it would be too easily persuaded to substitute its own decision in those instances. After all each judge has his own subjective view on many issues. This is so in spite of the fact that we judges have gone through the same training and perhaps gone through the same experience but we still decide differently.

[17] Although the two tier appellate stage is commendable the appeal to the final and apex court should be limited to certain limited grounds only. Another reason why there are appeals from a single judge to a court consisting of at least three members is that the single judge is more likely to fall into error than when this is shared with two other judges. When it comes to the second appellate stage the issues should be limited to only questions of law and as well as to achieve development of law with general interest or public advantage. It has

A been said that the House of Lords (since October 2009 called the Supreme Court) deals with only 'the crème-de-la-crème' of legal conundra which require the most weighty consideration and which has the widest implication in raising issues of general public importance.

B **[18]** In England, s 4 of the Appellate Jurisdiction Act 1876 provides:

> Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against *may be reviewed* before Her Majesty the Queen in her Court of Parliament, in order that the said Court may
C *determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal*. (Emphasis added.)

As a result the House of Lords was inundated with appeals from the Court of Appeal although over a century later, the Administration of Justice Act 1960 narrows down the right of appeal. Now s 1(2) of the Act reads:

D

> Section 1 Right of Appeal
>
> > No appeal shall lie under this section *except with the leave of the court below or of the House of Lords*; and such leave shall not be granted unless it is certified by the court below that *a point of law* of *general public importance is involved* in the
E decision and it appears to that court or to the House of Lords, as the case may be, that *the point is one which ought to be considered by that House*. (Emphasis added.)

In *R v Secretary of State for Trade and Industry, ex p Eastaway* [2000] 1 WLR 2222 at p 2228B Lord Bingham observed:

F

> In its role as a Supreme Court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.

G The practice of the apex court in England is not to give reason for refusing leave. The report would usually state as follow:

> Permission is refused because the petition does not raise an arguable point of law of general public importance which ought to be considered by the House at this time,
H bearing in mind that the cause has already been the subject of judicial decision and reviewed on appeal (*The Processing of Appeals in the House of Lords* [2007] LQR 571 at p 583).

In India the provision of granting leave to appeal is even wider than in the
I English provision. Article 136 of the Indian Constitution reads:

> (1) Notwithstanding anything in this Chapter, the Supreme Court may, *in its discretion, grant special leave to appeal* from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

The article grants a wide discretion to the Supreme Court but in practice the court consider itself not bound to interfere even if there is an error of law or fact in the impugned order. In a very recent decision of *Mathai @ Joby v George & Anor* (decision of the Supreme Court of India delivered on 19 March 2010) the Supreme Court held:

> ... this court observed that under art 136 it was not bound to set aside an order even if it was not in conformity with law, since the power under art 136 was discretionary.
>
> Though the discretionary power vested in the Supreme Court under art 136 is apparently not subject to any limitation, the court has itself imposed certain limitations upon its power …

In *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* AIR 2004 SC 1815 (at para 33) the Supreme Court observed that:

> The discretionary power of this court is plenary in the sense that *there are no words in art 136 itself qualifying that power*. The power is permitted to be invoked not in a routine but in very exceptional circumstances as and *when a question of law of general public importance arises or a decision sought to be impugned before this court shocks its conscience* (*Arunachalam v SK Sadhanantham* [1979] 2 SCC 297). This overriding and exceptional power has been vested in this court *to be exercised sparingly* and only *in furtherance of the cause of justice* (*Subedar v the State of UP* [1970] 2 SCC 445). The Constitution bench in *Pritam Singh v The State* [1950] SCR 453 cautioned that the wide discretionary power vesting in this court should be exercised sparingly and in exceptional cases only when special circumstances are shown to exist. In another Constitution bench (*Employees of the Bharat Bank Ltd, Delhi* [1950] SCR 459 Mahajan J (as His Lordship then was) reiterated the caution couching it in a different phraseology and said that this court would not under art 136 constitute itself into a tribunal or court just settling disputes and reduce itself into a mere court of error. The power under art 136 is an extraordinary power to be exercised in rare and exceptional cases and on well known principles.

In New Zealand, the granting of leave to appeal is based on s 13 of the Supreme Court Act 2003 No 53. It is as follows:

> 13 Criteria for leave to appeal
>
> (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that *it is necessary in the interests of justice for the Court to hear and determine the proposed appeal*.
>
> (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if —
>
> (a) The *appeal involves a matter of general or public importance;* or
>
> (b) A *substantial miscarriage of justice* may have occurred, or may occur unless the appeal is heard; or
>
> (c) The appeal involves *a matter of general commercial significance*.

(3) For the purposes of subsection (2), a significant issue relating to the Treaty of Witangi is a matter of general or public importance.

(4) The Supreme Court *must not give leave to appeal* to it against an order made by the Court of Appeal *on the interlocutory application unless satisfied it is necessary in the interests of justice* for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

(5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a). (Emphasis added.)

In *Beverley Rawleigh v Derek Maxwell Tait* [2009] NZSC 11 the Supreme Court of New Zealand held that:

[6] *The case turns on its own facts which were the subject of concurrent findings below Rawleigh v Tait* [2008] NZCA 525; *Rawleigh v Tait* (unreported, High Court, Wellington, CIV-2003–485–1924, Mallon J, 19 October 2007). We agree with counsel for the respondent that the applicant's submissions are misconceived. They do not persuade us that the Court of Appeal may have erred in law or that there is any appearance of miscarriage of justice. We agree with counsel for the respondent that the case principally relied upon for the appellant, *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651 (HL) does not support the proposed argument. (Emphasis added.)

In another case, *TFAC Limited and Ors v Susan Elizabeth David and Anor* [2009] NZSC 51, it was held that:

[3] However, assuming without necessarily accepting, that the applicant has correctly identified an error of law by the Court of Appeal, it would not involve any question of general importance. It would be *simply an error in the application of settled law* to facts of the particular case.

In South Africa, the Supreme Court Act 59 of 1959 does not provide grounds or criteria in granting leave of appeal. However, based on *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A), Justice Harms AJA observed that:

The jurisdictional requirements for a civil appeal emanating from a provincial or local division sitting as a court of first instance are twofold:

(a) the decision appealed against must be a 'judgment or order' within the meaning of those words in the context of s 20(1) of the Act; and

(b) the necessary leave to appeal must have been granted, either by the court of first instance, or where leave was refused by it, by this court.

Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, *the test is then 'whether the appeal — if leave were given — would lead to a just and reasonably prompt*

resolution of the real issue between the parties' (per Colman J in *Swartzberg v Barclays National Bank Ltd* 1975 (3) SA 515 (W) 518B). A

In other words leave will not be given if the decision would be purely academic.

In the United States, an appeal to the Supreme Court is by way of a writ of certiorari (US Constitution art III, s 2, cl 2 and in Statute 28 USC 1251). Peter J Messitte in an article, *The Writ of Certiorari: Deciding Which Cases to Review*, Journal USA, Issues of Democracy, 1 April 2005, stated that: B

> With the Judiciary Act of 1891, Congress for the first time gave the court authority to accept or to reject at least some appeals on a discretionary basis. *The said act authorized use of the writ of certiorari*, by which the court directs an inferior court to certify and transmit for review the record of a particular case. This device solved the problem for a time, but within 30 years the Court was once again burdened with mandatory appeals, for each of which the justices were required to study briefs, hear oral arguments, and issue written opinions. C
>
> Through the Judiciary Act of 1925, Congress simultaneously expanded the Court's certiorari jurisdiction, giving it much greater power to control the volume of its business. In 1988 Congress reduced the court's mandatory jurisdiction even further, and since then virtually all of the court's jurisdiction has been discretionary. Today, using the writ of certiorari, the Court considers only cases *of 'gravity and general importance' involving principles of wide public or governmental interest*. D E

He also mentioned that:

> Given the Court's inability to hear more than a fraction of cases for which certiorari is requested, it is not surprising that *the justices accept only those raising particularly significant questions of law, and/or those where there is a division of legal authority, as where lower courts have produced conflicting interpretations of constitutional or federal law*. In such cases, the Supreme Court may grant certiorari for the purpose of *establishing a nationally uniform understanding*. F

Justice Brandeis, the celebrated judge of the US Supreme Court had this to say: G

> The only way found practicable or acceptable in this country (USA) for keeping the volume of cases within the capacity of a court of last resort is to allow the intermediate courts of appeal finally to settle all cases that are of consequence only to parties. This reserves to the court of last resort only questions on *which lower courts are in conflict or those of general importance to the law*. (Emphasis added.) H

Chief Justice William H Rehnquist has this to say in his book, *The Supreme Court* at pp 234 and 238:

> *Whether or not to vote to grant certiorari strikes to me as a rather subjective decision, made up in part of intuition and in part of legal judgment*. One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court: If it has, its chances for being reviewed are much greater than if it hasn't. Another important factor is the perception of one or more justices that the lower-court I

decision may well be wither an incorrect application of Supreme Court precedent or of general importance beyond its effect on these particular litigants, or both.

The number of cases that we decide on the merits has varied considerably since I came to the Court. For the first fifteen years of my tenure, we would decide an average of about a hundred and fifty cases each term (note: in a year seven terms of two weeks each — from October to June). Then the number began to drop sharply, and in each of the last few terms of the twentieth century we have decided less than a hundred. This difference is due in part to our becoming selective in the cases we take. Even with less than a hundred cases, we are quite well occupied in doing what we ought to do — in the words of Chief Justice Taft, pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States' — without trying to reach out and correct errors in cases where the lower courts may have reached an incorrect result, but where that results is not apt to have any influence beyond its effect on the parties to the case.

Timothy S Bishop and Jeffrey W Sarles of Mayer Brown LLP in their article, *Petitioning and Opposing Certiorari in the US Supreme Court* (http://library.findlaw.com/1999/Jan/1/24/457.html) mentioned that:

The burden of showing that the federal issue presented for review is of *national importance becomes all the greater when there is no conflict. The best way to meet this burden is to show that the decision below has a significant impact not just on the petitioner but also on a whole industry or large segment of the population*. For example, the Court granted the certiorari petition one of us filed in *Hartford Fire Insurance v California*, No 91–1111, to decide whether agreements between insurers on the terms of standardized coverage forms were exempt from antitrust prosecution by the federal McCarran-Ferguson Act. Though there was no conflict among lower courts, the petition and amicus briefs filed by insurance industry associations argued that the industry depends upon agreements as to terms; that such agreements are necessary for insurers and beneficial to customers; and that anti trust scrutiny would therefore have tremendous practical consequences.

Finally, r 10 of the Rules of the Supreme Court of the United States that recently came into effect on 16 February 2010 clearly provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only *for compelling reasons*. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) *a United States court of appeals has entered a decision in conflict* with the decision of *another United States court of appeals* on the *same important matter*; has decided an important federal question in a way that *conflicts with a decision by a state court of last resort*; or has so far *departed from the accepted and usual course of judicial proceedings*, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has *decided an important federal question* in a way *that conflicts with* the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an *important question of federal law that has not been*, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari *is rarely* granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[19] I have gone rather at length on the practice of other common law countries on the questions that is in issue before us. I find that there is a common thread going through these cases. The leave to appeal to their respective apex courts acts as a filter against the number of appeals which have been proven to otherwise inundate them. At the same time this practice allows the apex courts to develop laws for public benefit or advantage as well as to correct any grave injustice committed by the courts below. At the end of the day it is a matter of discretion for the court to decide.

[20] The English and Indian provisions on appeal to their respective apex courts are very wide which to me, mean everything and nothing. In practice they recognise that their functions are to only hear cases in very limited circumstances. They have narrowed down or widen up (depending on how you look at it) their discretions. The same applies to the other common law countries referred to by me earlier in this judgment. In all these countries the limitations were introduced by the courts to overcome overwhelming number of appeals that they faced. While their legislations providing for leave to be granted are very widely and generally worded except perhaps New Zealand, ours are more specific. In the end it boils down to us having to look at our own specific provision.

MY DECISION

[21] Now, it is quite clear from the wording of s 96(a) that leave to appeal must be against the decision of the Court of Appeal. It cannot 'leap frog' from the High Court as it is permitted to be done in England in some special circumstances. Reference to the Federal Court under art 128 of the Federal Constitution is made directly to the Federal Court by the High Court but that reference is not an appeal. The Federal Court under that article decides a question and acts in its original jurisdiction. One of the very few appeals that 'leap frogs' to the Federal Court is in respect of application for habeas corpus s 374 of the Criminal Procedure Code; s 19 of the Legal Profession Act 1976.

[22] To obtain leave it must be shown that it falls under either of the two limbs of s 96(a) but they can also fall under both limbs. The argument put that leave should be more liberally allowed to enable the law to be developed would

defeat the limitation set by the two limbs of s 96(a). The purpose of s 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right, particularly where the relevant laws are well settled. When a case comes to the Federal Court the case would already have been reviewed on merits by three experienced judges at the Court of Appeal. So once an issue has been decided by the trial judge, and the appeal decided by a panel of three at the Court of Appeal, that is final unless it can be shown that the case falls within the scope of s 96(a).

[23] It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction. The legal issue posed to this court may have arisen from the decision of the High Court in exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. Under the first limb, that decision by the Court of Appeal must however have raised a question of law which is of general principle not previously decided by this court. If it has been so decided then that decision becomes a binding precedent in which case there is no need for leave to be given on that question. Alternatively the applicant must show that the decision would be to public advantage. In my opinion the fact that it would be of public advantage must necessarily involve further arguments before this court. Also, because it is to be decided by this court the words 'further argument and a decision of the Federal Court' used in that subsection are, to me, superfluous. There must necessarily be further arguments and the Federal Court must also make a decision. What is important is that the decision answering the question would be to the public advantage. In England, they use the term 'a point of law of general public importance' (s 1 of the Administration of Justice Act 1960). What is important to the public must also necessarily be an advantage to be decided by this court.

[24] If leave is required in the second limb of s 96(a) the novelty of the issue need not be shown because the limb requires further argument on the issue. So if further argument is required it cannot be a novelty issue. The applicant has to show that it is for public advantage.

[25] Of course the fact that a High Court decision in exercising its original jurisdiction has been reversed by the Court of Appeal or that decision of the Court of Appeal is by majority with a dissenting judgment are matters to be taken into consideration but they do not bind this court to grant leave. There have been instances where leave were granted even though there was a concurrent finding by the High Court and Court of Appeal. But those are rather exceptional.

[26] I find that the guidelines set by *Joceline Tan* rather too strict which may defeat the objective of s 96(a). In any case I do not agree with the interpretation given in that case that there must have been two inconsistent judgments of the Court of Appeal before leave could be given. In my opinion there need not had been two or more previous decisions of the Court of Appeal on the same issue. In my experience to find such a situation is going to make it extremely difficult for the intended appellant to obtain leave to appeal. Section 96(a) does not impose such a restriction and it is not for the court to do so.

[27] I would read the clause 'involving question of general principle decided for the first time' to mean a question, to be decided for the first time by the Federal Court. If the question is of general importance and the final arbiter is the Federal Court, that same question must have been decided at the Court of Appeal. If the question arose in the High Court, the dissatisfied party would have appealed to the Court of Appeal on that issue. It was argued before us that there could be a situation where while the appeal as a whole have been decided at the Court of Appeal, the particular question of law may not have been determined by that court and had it been determined in the way the applicant had argued, the appeal could have been in his favour. Following such argument, it was submitted that in such circumstances leave should be given on that question. My answer to that is that finality in resolution of a dispute between the parties is as important as a resolution on any point of law.

[28] A question that is of public importance will have a favourable consideration. If therefore, a dispute between two parties could be resolved without the necessity of answering any question of law, which is not of public importance, the appeal should end at the Court of Appeal. Any experienced counsel, given a chance, can always formulate any dispute in the form of a question of law. For example, in contracts, the meaning of a certain term or clause can always be drafted as a question of law (eg whether strict interpretation or interpretation to overcome the mischief). If the interpretation of that term or clause is peculiar only to that contract or to the parties to the case it cannot involve an issue of public advantage. Questions of facts also could always be formulated as a question of law eg as to the admissibility of a certain fact. I have seen many of such attempts in getting leave.

[29] Interpretations of statutory provisions are important but again in such a case leave is not to be given as a matter of course. When a statutory interpretation is in issue, it raises questions such as how important those provisions are to the public, or whether the interpretations are so obviously right that the Federal Court can only uphold the Court of Appeal's decision. These are pertinent questions to be asked when considering leave. Also, are questions as to whether the interpretation of such statutory provisions are likely

to be relevant to only the particular set of facts and to the particular parties, described as 'a particular fact situation' in *Syed Kechik* (see *Beverley Rawleigh*). If they are only relevant to the parties, leave should not be granted.

[30] Similar to the issue of statutory interpretation is the issue of interpretation of the terms of an agreement. As was said in *Syed Kechik* unless it can be shown that the interpretation of that term is important to the relevant trade or industry and likely to be raised in other case, leave should not be allowed. More often than not it depends on the finding of facts, which this court will not grant leave. Most likely it would be peculiar only to that agreement and the facts relating thereto.

[31] Section 96(a) does not mention achieving justice or to correct injustice or to correct a grave error of law or facts as grounds for granting leave to appeal. Every applicant would inevitably claim he has suffered injustice but the allegation of injustice by itself should not be a sufficient reason for leave to be granted. But once leave is granted on any one or more grounds discussed in this judgment this court can of course hear any allegation of injustice. Even an application for review under r 137 will be allowed only in certain limited circumstances which are quite well established (see *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833 and *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1).

[32] I would say that an applicant seeking for leave to appeal has a heavy burden. After he crosses the threshold his appeal shall be confined to matters, issues or questions in respect of which leave to appeal is granted. This is required by r 47 of the Rules of the Federal Court (r 47(4) of the Rules of the Federal Court — 'The hearing of the appeal shall be confined to matters, issues or questions in respect of which leave to appeal has been granted'). But in my opinion the appellate panel is not prevented from granting leave to amend the question allowed by the leave panel or even to add in new question in order to achieve the ends of justice. The requirement of the applicant to draft a question is merely to assist the court in complying with r 108(1)(c) of the Rules of the Federal Court (r 108 of the Rules of the Federal Court — '108(1) Where leave to appeal is granted the Court may ... (c) determine the questions or issues which ought to be heard in the appeal; ...') as well as to enable the leave panel to identify the question intended by s 96(a).

[33] The upshot of all what I had said above, I therefore accept the principles in *Syed Kechik* and reject those additional conditions set by *Joceline Tan*.

[34] My learned brother the Chief Judge of Sabah and Sarawak suggested and in fact assisted in drafting the following simplified guidelines, which:

In summary, an intended applicant for leave to appeal to this court should consider the following points before filing his application, namely:

(a) Basic prerequisites:

(i) that leave to appeal must be against the decision of the Court of Appeal;

(ii) that the cause or matter must have been decided by the High Court exercising its original jurisdiction;

(iii) that the question must involve a question of law which is of general principle not previously decided by the Federal Court (first limb of s 96(a)); and

(iv) that the issue to be appealed against has been decided by the Court of Appeal.

(b) As a rule leave will normally not be granted in interlocutory appeals.

(c) Whether there has been a consistent judicial opinion which may be uniformly wrong eg *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241.

(d) Whether there is a dissenting judgment in the Court of Appeal.

(e) Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance.

(f) That leave will not normally be given:

(i) where it merely involves interpretation of an agreement unless this court is satisfied that it is for the benefit of the trade or industry concerned;

(ii) the answer to the question is not abstract, academic or hypothetical;

(iii) either or both parties are not interested in the result of the appeal.

(g) That on first impression the appeal may or may not be successful; if it will inevitably failed leave will not be granted (see Lord Donaldson of Lymington MR in *The Iran Nabuvat* [1990] 3 All ER 9 at para 36.

REVIEW BY THE APPELLATE PANEL OF DECISION TO GRANT LEAVE

[35] It has also been the gravamen of many an appellant that once leave is granted the panel hearing the appeal should not set aside that leave. Let us view the practice by other Commonwealth countries on whether the appellate court, once leave is given, can or would rescind that leave. Cases seem to show

that when the facts of the case or all relevant and material facts are not disclosed candidly, concisely and comprehensively, particularly when leave was granted ex parte, such appellate court is not prevented from rescinding that leave. See *Toronto Railway Company v Corporation of the City of Toronto* [1920] AC 426 where facts are not correctly brought to the notice of the appellate court to which leave was sought but the appeal was from the Board of Railway Commissioners for Canada and not from a court in the true sense. See also *The Mussoorie Bank, Limited v Albert Charles Raynor* (1882) 7 App Cas 321.

[36] In some circumstances appeal to the Court of Appeal in England also require leave. In *The Iran Nabuvat* [1990] 3 All ER 9 a full court of three members panel of Court of Appeal was asked to review leave to appeal granted by a single judge viz Bingham LJ. Lord Donaldson of Lymington MR had this to say:

> It is the power to ask for a consideration inter partes in open court which has been exercised by the defendants in this case. They seek a reconsideration of the leave to appeal which was granted by Bingham LJ on a consideration of the written application of the plaintiffs for leave to appeal, and in the light of the documents which accompanied that written application.
>
> ... The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to be exercised by the court. This bias must always be towards allowing the full court [sic] to consider the complaints of the dissatisfied litigant, and the justification for leave to appeal in its present form or (if as I hope will come to pass) in an extended form must be that it is unfair to the respondent that he should be required to defend the decision below, unfair to other litigants because the time of the Court of Appeal is being spent listening to an appeal which should not be before it and thereby causing delay to other litigants, and unfair to the appellant himself who needs to be saved from his own folly in seeking to appeal the unappealable.
>
> The test of counsel for the defendants would really involve the single Lord Justice or, as is likely to be the case when there are changes in legislation, two Lords Justices hearing the application and deciding, if not whether the appeal should succeed, at least, as counsel would have us say, whether there was a probability and a reasonable likelihood of the appeal succeeding. This comes very near to actually hearing the appeal.
>
> For my part, I have no doubt at all that no one should be turned away from the Court of Appeal if he has an arguable case by way of appeal.
>
> That leads one on to the question of whether there is an arguable case in these particular circumstances. Again for my part, if a Lord Justice of Appeal, *having studied the matter on paper, is satisfied that there is an arguable case and grants leave, I think it would require some very cogent reasons for disagreeing with his decision, and it certainly would not be a reason that the court which was asked to reconsider his decision did not itself think that the matter was arguable.*

> It is certainly within my experience, and I do not doubt within the experience of every member of the Court of Appeal, that, having preread an appeal, one member of the court will say, 'I really think this is unarguable', and other members of the court will say, 'I do not know, I really think there is a point here which needs looking at seriously'. In the end, you may get a dissenting judgment or it may be that they will all come to the conclusion that the appeal is arguable or even that it should succeed.
>
> But the point that I am making is that, if one Lord Justice thinks that an appeal is arguable, it is really necessary, in my view, *for anybody seeking a reconsideration of that to be able to point fairly unerringly to a factor which was not drawn to the Lord Justice's attention, because, perhaps, it did not feature in the documents which had been studied, or to the fact that he has overlooked some statutory provision which is decisive, or some authority which is decisive, in the sense that the appeal will inevitably fail. That is really what leave to appeal is directed at, screening out appeals which will inevitably fail.*

[37] If that is the test of reviewing the decision of a single judge deciding the question on paper of whether leave should be granted, what more when leave is granted by a panel of three judges as is the practice of our Federal Court. According to *The Iran Nabuvat*'s decision, in order for any leave granted to be reconsidered, it has to be shown that certain facts or documents had not been studied by the judge granting leave or if that judge had overlooked some statutory provision or authority which is decisive based on which the appeal would inevitably fail if such appeal had been heard. This principle is similar to that based in the other cases earlier cited by me.

[38] It is to be noted that none of these cases touch on the merits of the case. They were all based on reasons that the applicants had not been honest and sincere in disclosing the facts of their cases. To me this principle is correct because the court can always set aside any order obtained by misrepresentation or fraud.

[39] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 255 this court held that it was not prevented from reconsidering the issue of leave and decided to dismiss the appeal and not answer the questions posed. It held that the question for which leave was granted were not questions of importance upon which further argument and decision of this court would be to public advantage. In coming to that decision it relied on a number of cases (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225, *Baldota Brothers v Libra Mining Works* AIR 1961 SCC 100, *Mukhlal Singh & Anor v Kishuni Singh & Ors* AIR 1931 Vol 18 PC 22(1), *Toronto Railway Company v Corporation of the City of Toronto*, *Hancock Family Memorial Foundation Ltd and another v Porteous and another* (2000) 201 CLR 347).

These cases could easily be distinguished. In fact this court in *Sri Kelangkota* highlighted the distinctions but 'despite that' held that they could still review the issue of leave.

[40] In *Meidi-Ya Co Ltd, Japan & Anor v Meidi (M) Sdn Bhd* [2009] 2 MLJ 14 Augustine Paul FCJ dismissed the appeal as the questions framed were according to him not sufficiently specific and precise to reflect the reason or ground upon which the orders were made by the Court of Appeal and the point of law involved which had the effect of invalidating the reason or ground, so as to satisfy the provision of s 96(a). To me we should not be too technical about this. It does not matter how a question is framed. Section 96(a) merely lays down the grounds upon which leave may be given. Rule 108 of the Federal Court Rules which deals with drafting of question is merely to identify the issue. The question, once it is drafted, can always be amended or modified to answer the question. I will go to the extent of saying that the requirement of drafting the question of law is merely procedural ie directory and not mandatory. Of course questions should be usefully drafted in such a way that the decision or the judgment will answer the question to achieve the objective of s 96(a). It will also assist the court in determining whether leave should or should not be granted.

[41] So in my view, once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel. Also, to use the word of Abdul Hamid Mohamad JCA in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, 'It is res judicata'. The appellate panel should respect the leave panel and just proceed to hear the appeal, even if the appeal is groundless. More often than not no reasons are given at leave stage.

[42] Incidentally, questions have been raised as to whether the judges sitting on the panel that granted leave should also sit to hear the appeal proper. Some argue that they should because they would know the facts and reason for granting leave. If this happens then the arguments as to whether leave once given should not be reconsidered would not have arisen. It has also been argued that if any member dissented at the leave stage, that member should not sit to hear the appeal, for it is argued that that dissenting judge could be bias. A similar argument could also be put by the party that obtained leave to prevent the dissenting judge from sitting at the appeal.

[43] In my opinion it does not make any difference who sits at the leave panel and who sits to decide the appeal. The issues, considerations and arguments that are before the leave panel, as can be seen above, would definitely be different from that that would be put to the appellate panel. The leave panel will consider whether the applicant has crossed the threshold set by s 96(a) but at the appeal proper this should not, as discussed above, be reopened. At the appeal the issues will be as posed in the questions. After hearing the arguments on the questions it does not prevent the appellate panel from deciding that the appeal is dismissed on the ground that from the facts fully argued it is found that leave should not have been allowed for reasons eg it is academic or it is based on facts or discretion.

GROUNDS OF JUDGMENT OF THE COURT OF APPEAL

[44] Are grounds of judgment of the Court of Appeal necessary to an application for leave? Generally I think not in every case. In a relatively short period that I have sat on this court I find that in many of the applications for leave, grounds of judgment of the Court of Appeal were not necessary. This is especially so when the judgment or order of the High Court has been upheld unanimously by the Court of Appeal. In such cases more often than not we can decide on the issues of leave without having to read the grounds. If the decision of the High Court has been reversed, grounds would then be beneficial. Where question of facts and law are obvious particularly so in interlocutory matters, no grounds again are necessary. Where we are doubtful we will of course call for the grounds. If the Court of Appeal is expected to prepare their grounds in every case I can foresee them to be bogged down with writing judgments although it is encouraged to at least provide broad grounds or brief reasons for its decisions. Interlocutory orders such as O 14, O 18 r 19 and so many other numerous interlocutory orders (there are well over 60 of them) are normally discretionary and should not be interfered with but left to the trial judge to decide, more so when these orders are not final (for example refusal of applications under O 14 or O 18 r 19). Such cases should just go on for trial. Parties insisting to seek for leave in such instances should be prepared to be heavily penalised with costs if they fail to obtain leave. If however both parties mutually agree that the issues in any case are new issues that should be ventilated because they would be to the public advantage, this court would seriously consider that request to grant leave.

[45] Considering that this part of the appeal, although substantially argued and for which purpose a lot of getting up has been put in, I do not intend to allow cost. Cost will be considered only for that part of argument on merits of their respective cases which will be heard after this.

[46] I have circulated this judgment in draft to all other members of this panel. After which I incorporated their comments. They have indicated to me that they are in agreement with it.

[47] We will now invite parties to argue the merits of their respective case based on the abovementioned principles.

Principles in Datuk Syed Kechik's case followed.

Reported by Kanesh Sundrum